85-2143 (1)

No. _____

Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

RAY A. C. JOHNSON,

Petitioner,

v.

CHUCK R. PATTESON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT M. SPIRE
Attorney General

SHARON M. LINDGREN
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Attorneys for the Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

65 pp

QUESTIONS PRESENTED

1. Whether the respondent was impermissibly terminated because of his exercise of constitutionally protected First Amendment rights in light of the subject of his statements, the position that the respondent held, and the disruption that his statement's caused to the functioning of the Nebraska State Auditor's Office?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Ray A. C. Johnson, the Nebraska State Auditor, and the respondent, Chuck Patteson, the petitioner's prior deputy.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinions Below	2
Jurisdiction	2
Statement of the Case	2
Reasons for Granting the Petition:	
I. The decision of the Third Circuit Court of Appeals in *Sprague v. Fitzpatrick*, 566 F.2d 560 (3rd Cir. 1976), *cert. denied*, 431 U.S. 937 (1977), is in direct conflict with the Eighth Circuit's decision in this case	6
II. The decision of the Eighth Circuit Court of Appeals in this case is contrary to this Court's decisions in *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968)	8
III. Additional guidance is needed in this area by public employers	10
IV. The issue presented by this case was specifically reserved by this Court in its decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)	11
CONCLUSION	12
APPENDIX (Opinions and Judgments of the Court of Appeals and Memorandum Decisions of District Court	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Connick v. Myers, 461 U.S. 138 (1983) 4, 7, 8, 9, 10, 11, 12

Czurlanis v. Albanese, 721 F.2d 98 (1983) 7

Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983) 7

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 9

Hughes v. Witmer, 714 F.2d 1407 (8th Cir. 1983)..... 7

Johnson v. Lincoln University of the Commonwealth, 776 F.2d 443 (3rd Cir. 1985) 7

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 9

Patteson v. Johnson, 721 F.2d 228 (8th Cir. 1983)..... 4

Patteson v. Johnson, 787 F.2d 1245 (8th Cir. 1986)..... 5

Pickering v. Board of Education, 391 U.S. 563 (1968) 4, 6, 7, 8, 10, 11, 12

Sprague v. Fitzpatrick, 566 F.2d 560 (3rd Cir. 1976) 6, 7

STATUTES:

28 U.S.C. § 1254 2

42 U.S.C. § 1983 3

No. _____

—o—

In The

Supreme Court of the United States

October Term, 1986

—o—

RAY A. C. JOHNSON,

Petitioner,

v.

CHUCK R. PATTESON,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The petitioner, Ray A. C. Johnson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on April 2, 1986.

—o—

OPINIONS BELOW

The opinions of the Court of Appeals for the Eighth Circuit are reported at 721 F.2d 228 (1983) and 787 F.2d 1245 (1986). They are also reprinted in the appendix hereto, pp. 23, 52, *infra*.

The memorandum decisions of the United States District Court for the District of Nebraska (Urbom, C.J.) have not been reported. They are reprinted in the appendix hereto, pp. 13, 40, *infra*.

———o———

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

———o———

STATEMENT OF THE CASE

The petitioner is the Nebraska State Auditor. This is an elected position.

The respondent began working in the Nebraska State Auditor's Office in 1975. In 1976, he was promoted to the position of Deputy Auditor. The Deputy Auditor ranks next to the State Auditor, and in the absence of the State Auditor, exercises the State Auditor's authority.

During 1980, a dispute arose between the petitioner and the respondent concerning an audit that had been conducted of the Nebraska Governor's Office. The propriety

of the audit became the subject of several newspaper articles.

As a result of this dispute, the relationship between the petitioner and the respondent, which had once been extremely close, deteriorated rapidly. In fact, it ultimately reached the point that the petitioner and the respondent were not even talking to each other.

On March 5, 1981, the petitioner and the respondent both attended a legislative committee hearing concerning proposed legislation that would require the State Auditor to be a certified public accountant. At the hearing, one Legislator questioned the respondent about the Governor's audit and why the respondent had not signed the audit. The respondent replied that he did not believe that the audit disclosed everything that it needed to disclose in order for him to sign it. The audit of the Governor's Office had been issued by the petitioner.

Following further deterioration of the parties' relationship, the petitioner terminated the respondent's employment as Deputy Auditor on June 12, 1981.

Following his dismissal, the respondent filed a lawsuit pursuant to 42 U.S.C. § 1983, claiming that he was terminated because of the statements that he had made to the committee of the Nebraska Legislature, and that a termination on this basis violated his constitutionally protected rights. Further, the respondent claimed that he had been deprived of a property right without due process as a result of the procedures followed by the petitioner at the time of the respondent's dismissal.

Following trial, the United States District Court, based on its interpretation of *Pickering v. Board of Education*, 391 U.S. 563 (1968), determined that the respondent was dismissed because of his statements to the Nebraska Legislative Committee, but that the respondent's speech was not constitutionally protected because of the position that the respondent held, and the need for a close working relationship between the petitioner and the respondent. Further, the district court determined that the respondent did not possess a property right in his employment.

This decision was appealed to the Eighth Circuit Court of Appeals. *Patteson v. Johnson*, 721 F.2d 228 (1983). While deciding all other issues presented by the appeal, including affirming the district court's finding that the respondent did not possess a property right in his employment, the Eighth Circuit remanded the First Amendment issue to the district court for further consideration in light of the then recent decision in *Connick v. Myers*, 461 U.S. 138 (1983).

On remand, the District Court determined that the plaintiff had been impermissibly terminated because of the exercise of his first amendment rights. In reaching this decision, the District Court stated (p. 45, *infra*):

> That Patteson's testimony before the legislative committee caused disruption in his relationship with Johnson is certain. It pushed over the brink what had been teetering there. There is no evidence that it had any other disruptive effect on anyone. The relationship between Patteson and Johnson immediately before Patteson's statement to the commitee was strained and fragile, largely because of Patteson's view of the

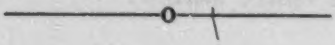
faulty audit of the Governor's office of a few months earlier. Patteson's effectiveness had been diminished before his legislative testimony and, although he remained in place, the state's interest in maintaining the kind of effectiveness his tenuous presence brought by the time he testified before the committee was moderate at best.

Viewing the interest of the state in light of the specific facts of the Patteson-Johnson relationship that was fractured by the legislative speech, in comparison with the specific facts of Patteson's motivations for testifying before the committee, I find that the state's interest was weaker than Patteson's.

Accordingly, Patteson's constitutional right to free speech was abridged and he is entitled to relief.

Further, the District Court found that the respondent's presence in the Nebraska State Auditor's Office would be so disruptive as to be contrary to the interests of all concerned and that reinstatement would be practically useless. The court then gave the petitioner the option of reinstating the respondent or paying the respondent a set amount in prospective damages. Back pay was not awarded because it was found that the petitioner had acted in good faith and that an award against him, in his official capacity, was barred the Eleventh Amendment to the United States Constitution.

The petitioner appealed the District Court's ruling on the First Amendment issue to the Eighth Circuit Court of Appeals. *Patteson v. Johnson*, 787 F.2d 1245 (1986). The Eighth Circuit affirmed the findings of the District Court and held that the respondent's dismissal was in violation of his First Amendment right to free speech.



REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Third Circuit Court Of Appeals In Sprague V. Fitzpatrick, 566 F.2d 560 (3rd Cir. 1976), Cert. Denied, 431 U.S. 937 (1977), Is In Direct Conflict With The Eighth Circuit's Decision In This Case.

In *Sprague v. Fitzpatrick*, 566 F.2d 560 (3rd Cir. 1976), *cert. denied* 431 U.S. 937 (1977), the court dealt with public statements made by an employee who had a close working relationship with his employer and found that the employee's statements were beyond the protection of the First Amendment. As in this case, the plaintiff was the first assistant to an elected officer—in *Sprague* a district attorney. The Third Circuit in *Sprague* found that the first assistant was the district attorney's "alter-ego." He assisted the district attorney in formulating policy, was primarily responsible for administration on a daily basis, kept the district attorney informed about the performance of the various divisions in the office and acted in the district attorney's place when he was unavailable. The plaintiff in *Sprague* made a public statement in response to questions which contradicted an earlier statement made by the district attorney. Employing the *Pickering* balance test, the Third Circuit noted the disruptive impact of the statement on the working relationship of the two men and found that a district attorney could certainly not be expected to run an efficient office, if his first assistant was free to impugn his integrity in public. In *Sprague*, the court stated:

> It is true that Sprague's interview . . . concerned matters of grave public importance. But this does not tilt the *Pickering* balance in favor of first amendment protection where, as here, the effectiveness of the employment relationship between employee-speaker and employer-target is so completely undermined. Indeed, the public uproar engendered by Sprague's pronouncements is precisely the factor that so thoroughly curtailed Sprague's usefulness as Fitzpatrick's deputy. [Citations omitted.] . . . The key question under *Pickering*, however, is whether the employment relationship has been seriously undermined. [Citation omitted.] If the arousal of public controversy exacerbates the disruption of public service, then it weighs against, not for, first amendment protection in the *Pickering* balance.

Id. at 565-566.

Sprague, even though decided prior to *Connick*, remains a viable case cited by various Circuit Courts, including the Eighth Circuit Court of Appeals. See, *Johnson v. Lincoln University of the Commonwealth*, 776 F.2d 443 (3rd Cir. 1985); *Hughes v. Witmer*, 714 F.2d 1407 (1983); *Czurlanis v. Albanese*, 721 F.2d 98 (1983); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983).

The facts of this case are not distinguishable from the facts in *Sprague*. In both cases, the plaintiff had a close working relationship with his employer. Both plaintiffs were the second in command in their respective offices and reported directly to an elected official. They were the "alter-egos" of their employers. They both assisted their employers with formulating policy, were primarily responsible for administration of the office on a daily basis, kept their employers informed about the performance of the

various divisions of the office, and acted in their employers' place when the employer was unavailable. Both Sprague and Patteson made public statements that either contradicted or brought into question the performance of their employer. Their comments were on issues of major public importance, and both were fired because it is absolutely impossible to efficiently operate a public office if the first assistant is free to challenge or contradict his superior's decision in public.

This conflict should be resolved by this Court.

II.

The Decision Of The Eighth Circuit In This Case Is Contrary To This Court's Decisions In Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board Of Education, 391 U.S. 563 (1968).

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court found that a school board's action in dismissing a teacher who wrote a letter to a local newspaper criticizing the way the board had handled recent bond issues violated the teacher's right to free speech. In so holding, this Court explained that the problem was to strike a balance between the interest of the public employee as a citizen and the interest of the state in promoting efficient performance of its employees. *Id.* at 568. As factors to be weighed in the balancing test, this Court cited close proximity with the person criticized, the effect that the speech had on maintaining either discipline by immediate superiors or harmony among co-workers and the need for personal loyalty and confidence for the proper functioning of the office. *Id.* at 569-570. Further, this Court stated:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situation, but merely note that significantly different considerations would be involved in such cases.

Id. at 570, n. 3. See, also, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court upheld the dismissal of an Assistant District Attorney as the result of the circulation of a questionnaire primarily concerned with matters of personal, not public, interest. One question was found to have a limited public interest. In finding that the lower courts had imposed an unduly onerous burden on the state to justify the employee's discharge, this court found " . . . that the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Id.* at 722. However, besides analyzing the nature of the employee's expression, "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 772. Further, this Court found that a wide degree of deference to the employer's judgment is appropriate when the employment relationship requires a close working relationship.

The District Court's opinion on remand, and the Eight Circuit's decisions on appeal are totally contrary to the holdings in *Pickering* and *Connick, supra.* In none of these opinions, did the lower courts give sufficient weight to the state's interest in the efficient operation of the State Auditor's Office. Instead of giving due difference to the petitioner's decision, in a situation involving a position which required the upmost in confidentiality and a close working relationship, the courts merely found that there had been prior problems between the petitioner and the respondent, and that this in some manner lessened or detracted from the State's interest.

The District Court's and Circuit Court's theory apparently is that if employer has a problem employee, who makes public statements critical of the employer that make a bad situation intolerable, the employer can't fire the employee because of the already strained relationship. Further, if an employer had an acceptable employee, who makes critical public statements that could potentially result in disruption of the office, the employer apparently could dismiss the employee. This defies logic. Also, it is totally contrary to *Connick, supra.*

III.

Additional Guidance Is Needed In This Area By Public Employers.

The volume of cases involving dismissals or other adverse personnel actions allegedly in violation of an employee's First Amendment rights is staggering. Solely in preparation for this request for certiorari, the petitioner has found hundreds of First Amendment cases decided following this Court's decision in *Connick, supra.* Just from the number of cases, it is clear that public employers do not

have the necessary standards to determine whether they are or are not violating an employee's First Amendment rights. They are forced to take no action, when action really should be taken, because of this lack of guidance. This, thereby, creates the very types of problems within public offices, inefficiency and disruption, that this court has sought to avoid through its decisions.

Further, the lower court decisions do not provide sufficient guidance. These decisions use varying standards, with one court stressing a particular aspect while another court totally ignores the same factor.

This case is particularly well suited for resolving many of the issues that still plague this area of the law. It presents a single issue. It involves public statements on an issue of great public importance, and it involves a relationship that requires a close working relationship.

From the number of cases raising this and similar issues, and the variance in the analysis used by the courts, it is clear that this Court's decision in *Connick,* while helping to clarify the various rights of the various parties, is not sufficient, and that further guidance is needed from this Court.

IV.

The Issue Presented By This Case Was Specifically Reserved By This Court In Its Decisions In Pickering v. Board of Education, 391 U.S. 563 (1968), And Connick v. Myers, 461 U.S. 138 (1983).

In *Pickering, supra,* this Court speculated that some positions in public employment could exist in which the need for confidentiality was so great that even completely

correct public statements might furnish a permissible ground for dismissal. *Id.* at 570, n. 3. In *Connick, supra,* this court stated: "We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."

In this case, the respondent's speech involved matters of public concern, the propriety of an audit of the Governor's Office. The question left unanswered in *Connick,* and *Pickering,* regarding what showing is necessary when an employee's speech undeniably involves matters of great public concern can be resolved by this case. This question remains unanswered, and should be resolved by this Court granting certiorari in this case.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

RAY A. C. JOHNSON

By ROBERT M. SPIRE
Attorney General

SHARON M. LINDGREN
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV81-L-217

CHUCK R. PATTESON,

Plaintiff,

vs.

RAY A. C. JOHNSON, State Auditor of Public Accounts for the State of Nebraska, in his official capacity, and individually,

Defendant.

MEMORANDUM OF DECISION

(Filed August 20, 1982)

APPEARANCES: For plaintiff, James Gessford
For defendant, Lynee Fritz, Assistant Attorney General

URBOM, Chief Judge

Charles R. Patteson, styled in the complaint as Chuck R. Patteson, was originally employed by the Auditor of Public Accounts, Raymond A. C. Johnson, named in the complaint as Ray A. C. Johnson, in 1975 and worked in various assignments until 1976, when he was appointed by the defendant as Deputy Auditor. The plaintiff held the position until he was terminated by the defendant effective July 15, 1981. The plaintiff now sues for deprivation of rights protected by the Constitution of the United States and asserts state law claims as well. The action is under 42 U.S.C. §§ 1983 and 1988. Jurisdiction is conferred by 28 U.S.C. §§ 1331 and 1343.

DUE PROCESS

Board of Regents of State Colleges v Roth, 408 U.S. 564 (1972), is the guiding case regarding due process employment tremination cases. In it the court said:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. The interests—property interests—may take many forms.
>
> * * *
>
> " . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . "
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits . . . . "
>
> 408 U.S. at 576-577

Perry v Sinderman, 408 U.S. 593 (1972), and *Bishop v Wood,* 426 U.S. 341 (1976), make it clear that a property interest may be created by implied contract arising under state law.

Here, there is no statute or written rule or regulation that has granted to the plaintiff any right to continued employment. He does not claim there is, but urges that the unwritten customs and practices of the office of Auditor of Public Accounts have created a "legitimate claim of en-

titlement" to continued employment absent good cause for discharge, absent notification of the cause of dissatisfaction, and absent the taking of corrective action prior to discharge.

Whether Nebraska law would grant a property right to continued governmental employment when such an unwritten custom or practice exists has not specifically been decided by the Supreme Court of Nebraska, but I conclude that the preponderance of the evidence does not show that a custom or practice of sufficient stoutness existed in the office of Auditor of Public Accounts relative to the Deputy Auditor during the plaintiff's term of employment to give rise to a property interest in the plaintiff.

The plaintiff was appointed Deputy Auditor by the defendant in 1976 for no definite period but not to exceed the defendant's term in office. The defendant's then term ended in 1978; he was reelected in 1977 for another four-year term, and the plaintiff was continued in his position as Deputy Auditor. No explicit agreement was made between the plaintiff and defendant as to the expectation of continued employment.

Some policies of the office of Auditor of Public Accounts were matters of unwritten custom. Ordinarily, the defendant gave employees an opportunity to improve performance before termination. Generally, corrective measures included conferences, demotions, denials of a raise, transfers, or warnings. Terminations of employees were always for cause.

No such practice, however, obtained as to the position of Deputy Auditor. That position differed from that of other employees in several respects. It was specifically au-

thorized by statute—§ 84-314, R.R.S. Neb. (1943). The Deputy Auditor was required to give a bond to the State of Nebraska, was statutorily authorized to "do and perform in the absence of the auditor such acts herein authorized and required of the auditor, as the auditor may authorize him to do, subject to the same restrictions." The Deputy Auditor was required by statute to be a certified public accountant. During the defendant's term as State Auditor he appointed five different Deputy Auditors, including the plaintiff; none, except the plaintiff, was terminated involuntarily. The plaintiff was considered a "permanent" employee, but that term related only to fringe benefits, such as vacation, insurance, and retirement accruals. Other employees, but not the Deputy Auditor, were the subjects of a formal evaluation procedure.

None of the foregoing facts show that a custom or practice existed to the effect that the plaintiff or any other Deputy Auditor could reasonably expect to be continued in that position in the absence of good cause for termination or in the absence of being informed of reasons or dissatisfaction or in the absence of corrective action taken before termination.

In Nebraska "[i]t is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Nebraska Department of Roads Employees Association v Department of Roads,* 189 Neb. 754, 205 N.W.2d 110 (1973); *Nevels v State,* 205 Neb. 642, 289 N.W.2d 551 (1980). Neither the state personnel system nor the merit system applies to the position of Deputy Auditor and no case has been cited by which the Supreme Court of Nebraska has given to any state government employee a property interest in the absence of legis-

lation. *In Mau v Omaha National Bank*, 207 Neb. 308, 299 N.W.2d 167 (1980), the court discussed a possible exception to the "employment at will" rule where discharge of an employee is violative of a public policy of the state. Even if that exception were adopted by the Supreme Court of Nebraska—which it has not been—I have no impression that the exception would give rise to a property interest.

It seems to me that in order to constitute a property interest where there is no statute, there must at least be a firmly rooted practice or custom with respect to the position under consideration. No such practice here existed.

It follows that the plaintiff's claim based upon the due process clause must be denied.

FREE SPEECH

A part of the reason for the plaintiff's discharge by the defendant was what the plaintiff said during his testimony before a legislative committee on March 5, 1981. The hearing of the committee was on a bill which would require the state auditor to be a certified public accountant. The plaintiff testified in favor of the bill and opened his statement to the committee by saying:

> " . . . I'm a Deputy State Auditor. I'm a CPA. I have aspired to be the State Auditor. I think I probably will in the future. So that probably makes me a little biased. I am biased because I am an auditor and I know what's involved in being an auditor. I know what it takes to do a good job of auditing . . . . "
>
> Plaintiff's Exhibit 2, pp. 24-25

Communication between the parties dimished after that, and by the time of the discharge there was scarcely any interaction between them. Their jobs obviously re-

quired, if there was to be an efficient operation, close contact and frequent communication between them. There had been difficulties between them prior to the plaintiff's testimony before the legislative committee, primarily arising out of a disagreement about a report of an audit of the governor's office in September, 1980, but I am persuaded that a termination of the plaintiff's employment in mid-1981 would not have occurred if the plaintiff had not testified before the legislative committee.

The applicable standard is set in *Mt. Healthy City School District Board of Education v Doyle*, 429 U.S. 274 (1977), wherein the court said:

> "Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him . . ., he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms . . . ."
>
> 429 U.S. at 283-284

The plaintiff's brief correctly analyzes the *Mt. Healthy* decision as establishing a three-tiered test: (1) was the employee's speech a substantial or motivating factor in his dismissal? (2) was the speech constitutionally protected? (3) would the employee have been fired absent the speech? I find that the plaintiff's speech was a substantial or motivating factor in his dismissal and that he would not have been fired absent the speech. However, I find that the speech was not constitutionally protected.

In *Pickering v Board of Education*, 391 U.S. 563 (1968), the court at footnote 3 said:

"It is possible to conceive of some position in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases."

391 U.S. at 570

The facts of the present case show that the relationship between the plaintiff and the defendant as subordinate and superior was supposed to be, and needed to be for the effective running of the office, exceptionally close. The plaintiff was to act in the place of the defendant when the defendant was absent. The plaintiff assisted in the making and carrying out of policies of the office; the defendant depended upon him to discern and articulate to the defendant all kinds of matters relating to the office. As the closest associate in the office, the plaintiff occupied a special position of trust and confidence. Therefore, whatever would cause a material breach of that relationship was destructive to vital interests of the state. Accordingly, the case fits the facts of *Sprague v Fitzpatrick*, 546 F.2d 560 (C.A. 3rd Cir. 1976), more closely than it fits *Van Ooteghem v Gray*, 628 F.2d 488 (C.A. 5th Cir. 1980). It must be remembered that even though the defendant knew in advance that the plaintiff was going to testify at the legislative hearing, and had no objection to that, he did not know what the plaintiff intended

to say and did not know at the time he consented to the plaintiff's testifying that the plaintiff would testify about his disagreement with the defendant's report of the audit of the governor's office of several months earlier. In that testimony the plaintiff made it known that he thought the audit "did not disclose everything it needed to disclose in order for [him] to sign it." Plaintiff's Exhibit 2, page 27. Later in campaign literature, when the plaintiff was running against the defendant for the office of Auditor of Public Accounts, he said that he had "refused to sign a shoddy, inaccurate audit." Defendant's Exhibit 105. The disagreement between the plaintiff and defendant about the audit of the governor's office had been for several months before and at the time of the legislative testimony was deep and decisive. In that setting the testimony wherein the plaintiff indicated his ambition for the office held by the defendant, his declaring his competency as a Certified Professional Accountant, and his statement of disagreement with his superior's decision regarding the audit of the governor's office became a significant interference with the operation of the defendant's office. As such, it was not protected speech.

STATE LAW CLAIMS

The plaintiff's state law claims are based upon the fact that Nebraska has enacted a statute—§ 20-148, R.R.S. Neb. (Reissue 1977)—which places liability on anyone who subjects another "to the deprivation of any rights, privileges or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska." The statute does not reach beyond any of the principles heretofore discussed and cannot, therefore, be the basis for a finding for the plaintiff.

The plaintiff also argues that in light of *Mau v Omaha National Bank*, supra, the Supreme Court of Nebraska probably would find an exception to the "at will" rule and that the plaintiff's discharge was wrongful because it was in violation of the state's policy. I have already indicated that Nebraska has not adopted the exception, but even if it had, I find nothing in Nebraska public policy which would declare that the discharge in this case was at odds with that policy.

Judgment will be entered for the defendant.

Dated August 20, 1982.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV8-L-217

CHUCK R. PATTESON,

Plaintiff,

vs.

RAY A. C. JOHNSON, State Auditor of Public Accounts for the State of Nebraska, in his official capacity, and individually,

Defendant.

JUDGMENT

(August 20, 1982)

For the reasons stated in the accompanying memorandum of decision,

IT IS ORDERED AND ADJUDGED that judgment is entered for the defendant.

Dated August 20, 1982.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

JUDGMENT

(Filed January 23, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2125-NE

Chuck R. Patteson,

Appellant,

vs.

Ray A. C. Johnson, etc.,

Appellee,

Appeal from the United States District Court for the District of Nebraska.

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, vacated in part and remanded to the said District Court for proceedings consistent with the opinion of this Court.

November 16, 1983

A true copy.

ATTEST:

/s/ Robert D. St. Vrain
CLERK, UNITED STATES
COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2125

Appeal from the United States District Court for the District of Nebraska.

Chuck R. Patteson,

Appellant,

v.

Ray A.C. Johnson, State Auditor of Public Accounts for the State of Nebraska, in his official capacity, and individually,

Appelleee.

Submitted: February 17, 1983

Filed: November 16, 1983

Before LAY, Chief Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Chuck R. Patteson, former Deputy Auditor of the Nebraska Office of Public Accounts, appeals from the district court's[1] judgment dismissing his civil rights action against defendant Ray A.C. Johnson, the Nebraska State Auditor of Public Accounts. Johnson discharged Patteson from his position as the Deputy State Auditor and Patteson brought suit claiming the discharge violated his constitutional rights of due process and free speech. Patteson also raised claims under Nebraska law. The district court denied all of Patteson's claims. We affirm the court's judgment on the due

---

[1]The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

process claim, but vacate the judgment on the first amendment claim and his similar claim under Nebraska law.

I. *Background.*

Patteson, a certified public accountant, began working in the Nebraska State Auditor's Office in 1975. The following year Johnson promoted Patteson to Deputy Auditor. The Deputy Auditor ranks next to the State Auditor and in his absence may act in his place.

Sometime in 1978 or 1979, the Auditor's Office, under Johnson's direction, began following the American Institute of Certified Public Accountants' Generally Accepted Auditing Standards (CPA Standards). The Auditor's Office also began following the General Accounting Office's Auditing Standards (GAO Standards), and started issuing opinions with every audit. In addition, Johnson developed his own internal auditing standards. Johnson instructed his staff to follow all of these standards.[2]

On September 18, 1980, the Auditor's Office issued an audit on the operations of the Governor's Office from 1977 to 1980. The audit did not contain an opinion section, and for this reason failed to comply with the CPA Standards, the GAO Standards, or Johnson's own standards.[3] Several

---

[2]Johnson told his staff that failure to follow these standards would subject them to discipline.

[3]At trial, Johnson testified that this had been the first audit issued without an opinion since his office had adopted the new standards two years earlier. Neither Patteson nor the audit supervisor signed the audit, although both customarily did so. In addition, the audit did not contain the auditors' notes to the financial statements.

months later, in a March 1, 1981 story headlined, "Audit of Governor's Office Lacks Usual Endorsements," the Lincoln Sunday Journal and Star published an article asserting that the audit departed from the recently adopted accounting standards. The article noted that the audit "fails to discuss issues of potential embarrassment to Governor Charles Thone despite the fact that Johnson's staff members raised them during their audit." The article also noted that Thone and Johnson are both Republicans. Patteson, who was by this time a Republican candidate for State Treasurer, declined comment to the press.

Four days later, Patteson and Johnson, who also was a certified public accountant, attended a state senate committee hearing to testify on proposed legislation that would require the State Auditor to be a certified public accountant. Patteson appeared at the hearing at the invitation of the legislative committee of the Nebraska Society of Certified Public Accountants, which was supporting the legislation. As the hearing proceeded, it became apparent that the senators were going to inquire about the audit of the Governor's Office (Governor's Audit). At this point Johnson left the hearing, but did not ask Patteson to leave, and in fact did not give him any instructions.

Patteson remained at the hearing and testified in favor of the proposed legislation. In the course of his testimony, the legislators asked questions about the Governor's Audit. In response to a qeustion from Senator Chambers inquiring why Patteson had not signed the Governor's Audit, Patteson stated, "In my opinion the audit did not disclose everything it needed to disclose in order for me to sign it." After that Patteson avoided direct answers to Senator Cham-

bers' questions that pressed for additional information about the audit.

At the urging of several senators, the Nebraska State Board of Accountancy (State Board) considered the audit of the Governor's Office, and, at its March 18, 1981 meeting, referred the matter to its Ethics and Standards Enforcement Committee for an investigation. The Committee, however, delayed its investigation, and requested the Attorney General to issue an opinion outlining the scope of the State Board's jurisdiction over the matter. On June 12, 1981, the Attorney General issued an opinion stating that the State Board had no jurisdiction over the matter. That same afternoon Johnson terminated Patteson's employment. Thereafter, Patteson filed for and unsuccessfully ran against Johnson for the position of State Auditor.

Alleging claims under 42 U.S.C. §§ 1983 and 1988, Patteson brought suit claiming his termination violated his fourteenth amendment procedural due process rights and his first amendment free speech rights. He also claimed that his termination violated state law. The district court denied Patteson's due process claim on the ground that Patteson had established no "legitimate claim of entitlement" to continued employment. The district court noted that no statute, written rule, or regulation granted a right to continued employment for the Deputy Auditor. In addition, the court ruled that custom or practice in the Auditor's Office was insufficient to vest any property interest in Patteson's cotinued employment.

Turning to Patteson's first amendment claim, the district court found "that a termination of the plaintiff's employment in mid-1981 would not have occurred if the plain-

tiff had not testified before the legislative committee." Although the district court found that Patteson's testimony constituted a substantial or motivating factor in the discharge, it nevertheless denied relief, concluding that the first amendment's protections did not extend to Patteson's speech. The district court summarily rejected Patteson's state law claims, observing that the reach of the state claims did not extend beyond the federal claims.

II. *Discussion.*

A. *Due Process.*

Individuals deprived of life, liberty or property by a state are entitled to procedural protections under the due process clause of the fourteenth amendment. *Board of Regents v. Roth,* 408 U.S. 564, 568 (1972). In this case we are concerned only with an alleged deprivation of property. In *Roth* the Supreme Court stated that

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. * * * It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. [*Id.* at 577.]

Unless Patteson establishes a legitimate claim of entitlement to continued employment, his claim to procedural protections before dismissal must fail.

Patteson claims a property interest in his employment by reason of unwritten customs, policies, and understandings that existed in the Auditor's Office. In determining whether these practices constitute a "legitimate claim of

entitlement" to continued employment, the district court properly looked to Nebraska law. Without deciding whether government employees generally have a property right to continued employment by virtue of custom or practice, the district court concluded that no custom or practice of "sufficient stoutness" created a property right in Patteson's employment as Deputy Auditor. For the reasons stated in the district court's opinion, we affirm the denial of Patteson's due process claim.

B. *Free Speech.*

Patteson also contends that his first amendment rights were violated. He argues, and the district court found as a factual matter, that he was fired in retaliation for testifying truthfully before the legislative committee.

A state cannot terminate public employees for exercising their first amendment rights. *See Pickering v. Board of Education*, 391 U.S. 563, 574 (1968); *Keyishian v. Board of Regents*, 385 U.S. 605-06 (1967). Nevertheless, while employees do not relinquish their right to speak out on issues of public concern when they enter public service, those rights may be subject to the overriding interests of the state as an employer. Under the *Pickering* test, the court's task is to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." *Pickering, supra*, 391 U.S. at 568. In weighing these competing interests, courts are to consider both the nature of the employee's expression and the nature of the employment relationship. *See Connick v. Myers*, 103 S.Ct.

1684 (1983); *Hughes v. Whitmer*, slip op. Nos. 83-1338 and 82-1538 (8th Cir. August 4, 1983).

Applying the *Pickering* principles to this case, the trial court should have balanced the state's interest in ensuring the efficient operation of the Auditor's Office against Patteson's interest as a citizen, certified public accountant, and state official in truthfully testifying about pending legislation and responding to Senator Chambers' questions concerning the Governor's Audit. The district court, however, considered only the state's interest, and thus, incorrectly applied the *Pickering* balancing test.

The district court stated as to Patteson's testimony:

> In that testimony the plaintiff made it known that he thought the audit "did not disclose everything it needed to disclose in order for [him] to sign it." Later in campaign literature, when the plaintiff was running against the defendant for the office of Auditor of Public Accounts, he said that he had "refused to sign a shoddy, inaccurate audit." The disagreement between the plaintiff and defendant about the audit of the governor's office had been for several months before and at the time of the legislative testimony was deep and [devisive]. In that setting the testimony wherein the plaintiff indicated his ambition for the office held by the defendant, his declaring his competency as a Certified [Public] Accountant, and his statement of disagreement with his superior's decision regarding the audit of the governor's office became a significant interference with the operation of the defendant's office. As such, it was not protected speech.[4]

---

[4]The later campaign statements cited by the district court appear irrelevant because they occurred after the discharge.

(Continued on following page)

By failing to consider Patteson's interest in testifying about pending legislation and responding to questions about the Goveror's Audit, the district court failed to consider Patteson's comments on a matter of substantial public concern, and weighed only the disruptive effect of the speech on his relationship with his superior.[5] The court found

---

(Continued from previous page)

Additionally, the district court may have taken some of Patteson's comments out of context and interpreted them incorrectly. The court found that Patteson disrupted operations in the Auditor's Office by indicating in his testimony his ambition for Johnson's job and his competency as a certified public accountant to perform it. The evidence does not support that finding.

The legislative committee was considering a bill that would require the State Auditor to be a certified public accountant. Patteson testified in favor of the bill, and said in his opening remarks,

> I'm a Deputy State Auditor. I'm a CPA. I have aspired to be the State Auditor. I think I probably will be in the future. So that probably makes me a little biased. I am biased because I am an auditor and I know what's involved in being an auditor. I know what it takes to do a good job of auditing.

After reviewing Patteson's testimony before the legislative committee, it is evident that Patteson simply intended to apprise the committee that as a certified public accountant interested in someday being state auditor, he would benefit from the proposed bill. Nothing in the record indicates that this statement was an affront to Johnson or reflected a then-present political ambition to run against Johnson.

[5]Observing that Patteson held a special position of trust and confidence in the Auditor's Office, the district court noted,

> [T]he relationship between [Patteson] and [Johnson] as subordinate and superior was supposed to be, and

(Continued on following page)

support for its position in language in *Pickering* stating that significantly different considerations would be involved when "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them." 391 U.S. at 570 n.3. Although special considerations certainly enter into the *Pickering* analysis when speech by especially trusted employees causes disruption and dissension within the government, we hold that the balancing test articulated in *Pickering* remains the proper standard. That test requires balancing of the employee's and the public's interest in free speech against the interest of the state in promoting the efficiency of the public services it performs through its employees. *Id.* at 568.

The Supreme Court's decision in *Connick v. Myers*, 103 S.Ct. 1684 (1983), supports this analysis and resolves any doubt about the applicability of the balancing test to high-level public employees. In that case an assistant district attorney, Myers, was dismissed for circulating to other attorneys in the office a questionnaire that included an inquiry about the attorneys' confidence in their super-

---

(Continued from previous page)

> needed to be for the effective running of the office, exceptionally close. [Patteson] was to act in the place of [Johnson] when [Johnson] was absent. [Patteson] assisted in the making and carrying out of policies of the office; [Johnson] depended upon him to discern and articulate to [Johnson] all kinds of matters relating to the office. As the closest associate in the office, [Patteson] occupied a special position of trust and confidence.

visors. *Id.* at 1687. Before applying the *Pickering* balancing test to determine whether Myers' speech was constitutionally protected, the Court specifically noted her status as an especially trusted employee, and observed that it was important "to the efficient and successful operation of the District Attorney's office for assistants to maintain close working relationships with their superiors." *Id.* at 1693. The Court ultimately struck the *Pickering* balance in favor of the Government, but it did so only after weighing the disruption in the office caused by the speech against the extent to which the questionnaire touched upon matters of public concern. *Id.* at 1694. Because Patteson's statements before the legislative committee must be evaluated under the *Pickering* balancing test, the district court erred in considering only the state's interests in its analysis.

Although the ultimate determination in whether speech is constitutionally protected is a question of law, *Connick v. Myers, supra* at 1690 n.7 & 1692 n.10; *Van Ooteghem v. Gray,* 628 F.2d 488, 492 (5th Cir. 1980), we believe that in the present case the district court should have the initial opportunity to weigh the competing interests under the proper standard. Accordingly, the district court's opinion is vacated and remanded so that it may correctly apply the *Pickering* test.

In applying the *Pickering* analysis to this case, the district court should give special attention to the nature of Patteson's speech. As the Supreme Court stated in *Connick,* "the state's burden in justifying a particular discharge varies depending on the nature of the employee's expression." 103 S.Ct. at 1691-92. In *Connick* the em-

ployee's expression was characterized as "an employee grievance concerning internal office policy," and accordingly was given little weight in the balancing test. *Id.* at 1693-94. In this case, however, Patteson's speech touched upon issues of public concern far weightier than those expressed in *Connick*.

Undoubtedly, Patteson's statement that the Governor's Audit "did not disclose everything it needed to disclose in order for [him] to sign it" related to a matter of substantial public concern. His testimony came within days after the press and the legislature had devoted significant attention to the Governor's Audit, and in particular to whether the audit report attempted to conceal certain expenses in the Governor's Office. Moreover, Patteson made the statement in response to a question by Senator Chambers, and nothing in this record indicates his testimony was other than truthful.

On the other side of the *Pickering* balancing test, the court must consider the state's interest in ensuring the efficient operation of the Auditor's Office. As the district court observed, the disagreement between Patteson and Johnson over the Governor's Audit was deep and devisive. The district court should weigh the disruptive effect of Patteson's legislative testimony upon the employment relationship against his right to testify upon pending legislation, his obligation to respond truthfully to legislative questioning, the public interest relating to the matter in controversy, and whether or not it was essential that he speak out, as he did, without retaliatory dismissal. Accordingly, we remand to the district court for further consideration and application of the balancing test as enunciated in *Pickering* and *Connick*.

C. *State Law Claims.*

Patteson also brings state law claims under § 20-148, Neb. Rev. Stat. (Reissue 1977). This statute is very similar to 42 U.S.C. § 1983, and Patteson concedes that it applies only if this court finds that Johnson violated Patteson's constitutional rights. Because we affirm the district court's denial of Patteson's due process claim, we also agree that he cannot recover on that basis under § 20-148, Neb. Rev. Stat. However, to the extent that the state claims resting upon free speech principles stand dismissed because of the trial court's improper application of the balancing principles set forth in *Pickering* and *Connick*, that dismissal is vacated subject to further consideration by the district court.[6]

III. *Conclusion.*

Accordingly, we affirm the district court's judgment on the due process claim, and vacate and remand the first amendment and similar state law claims for further consideration consistent with this opinion.

ROSS, concurring in part and dissenting in part.

I concur in the majority's analysis of the due process issue. However, it is my opinion that Patteson's testimony before the legislative hearing committee was not constitutionally protected speech and, as such, I would af-

---

[6]We reject Patteson's claim under state law that his dismissal violated Nebraska public policy. The district court ruled that even if Nebraska allows employees to claim they were wrongfully dismissed in violation of public policy, such a cause of action would not apply to this case. We see no reason to disturb this determination.

firm the district court. When Patteson's remarks are viewed in light of the political nature of his appointment, the nature of his job, the necessity of a close working relationship with the appellee, the fact that the information was already public and may not have been of great public importance in any event, I must respectfully dissent from Part IIB of the majority's opinion.

The majority correctly defined the court's duty to balance the state's interest as an employer against Patteson's interest as a citizen, as mandated by the Supreme Court's holding in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Slip op. at 6. However, the majority then misapplied the *Pickering* principles to the facts of this case and consequently, in my view, erred in striking the balance for Patteson.

In *Connick v. Myers*, 103 S.Ct. 1684 (1983), the Supreme Court recently clarified its position on how to properly apply the *Pickering* balance test in a case quite similar to this case. The majority should have applied the teaching of *Connick* to this case instead of trying to sidestep its analysis by an attempted distinction. Slip op. at 10. This case involves an employment dispute between a subordinate and his superior. Because *Connick* is controlling and the district court opinion comports with *Connick*, I do not see the necessity of a remand.

The Court in *Connick* held that relevant considerations in applying the *Pickering* balance test are: 1) whether a close working relationship is necessary; 2) the manner, time and place in which the speech occurred; and 3) the context in which the dispute arose. All of these factors are germane in this case and require striking the balance in favor of the appellee. First, the necessity of a close

working relationship between a deputy auditor and the state auditor who appointed him goes without saying. Second, the manner, time and place in which Patteson's remarks arose indicate his true motive in speaking to the legislative committee. Patteson was not requested by the committee to testify but volunteered such information after appellee had left the hearing. Moreover, his opening statement made it clear that he was giving a political speech which was certain to cause dissension within the office. Slip op. at 7-8, n.4. Third, in discussing the significance of the context in which the dispute arose, the Court in *Connick* stated:

> When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.

Id. at 1693.

This statement is clearly applicable to Patteson's statements to the legisaltive committee. Patteson's speech arose from an employment dispute concerning office policy on signing the audit of the Governor's office. Shortly after Johnson and Patteson disagreed on the application of such policy to Johnson in this instance, Johnson voluntarily testified before the legislative committee. Thus, according to *Connick*, additional weight must be given to Johnson's view that Patteson had threatened his authority to run the office.

I believe that the majority misapplied *Connick* when they ignored one of the most important findings made by the district court. The district court stated:

The facts of the present case show that the relationship between the plaintiff and the defendant as subordinate and superior was supposed to be, and needed to be for the effective running of the office, exceptionally close. The plaintiff was to act in the place of the defendant when the defendant was absent. The plaintiff assisted in the making and carrying out of policies of the office; the defendant depended upon him to discern and articulate to the defendant all kinds of matters relating to the office. *As the closest associate in the office, the plaintiff occupied a special position of trust and confidence. Therefore, whatever would cause a material breach of that relationship was destructive to vital interests of the state.* Accordingly, the case fits the facts of *Sprague v. Fitzpatrick,* 546 F.2d 560 (C.A. 3rd Cir. 1976), more closely than it fits *Van Ooteghem v. Gray,* 628 F.2d 488 (C.A. 5th Cir. 1980). It must be remembered that even though the defendant knew in advance that the plaintiff was going to testify at the legislative hearing, and had no objection to that, he did not know what the plaintiff intended to say and did not know at the time he consented to the plaintiff's testifying that the plaintiff would testify about his disagreement with the defendant's report of the audit of the governor's office of several months earlier. In that testimony the plaintiff made it known that he thought the audit "did not disclose everything it needed to disclose in order for [him] to sign it." Plaintiff's Exhibit 2, page 27. Later in campaign literature, when the plaintiff was running against the defendant for the office of Auditor of Public Accounts, he said that he had "refused to sign a shoddy, inaccurate audit." Defendant's Exhibit 105. The disagreement between the plaintiff and defendant about the audit of the governor's office had been for several months before and at the time of the legislative testimony was deep and decisive. In that setting the testimony wherein the plaintiff indicated his ambition for the office held by the defendant, his declaring his competency as a

> Certified Professional Accountant, and his statement of disagreement with his superior's decision regarding the audit of the governor's office became a significant interference with the operation of the defendant's office. As such, it was not protected speech.

(Emphasis mine.) The majority opinion cited part of the above passage. Slip op. at 8, n.5. However they did not cite, nor did they consider, the crucial factual and legal conclusion drawn by the district court: that appellant's conduct became "a significant interference with the operation of defendant's office" and that whatever caused a material breach of an exceptionally close relationship was destructive to the vital interests of the state. The district court discussed the very factors relied upon in *Connick* and reached a similar conclusion.

In sum, I find, as did the Supreme Court in *Connick*, that the limited first amendment interest involved here does not require that Johnson tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Patteson's discharge therefore did not offend the first amendment and the judgment of the district court should be affirmed.

A true copy.

Attest: /s/ Robert D. St. Vrain
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV81-L-217

CHUCK R. PATTESON,

Plaintiff,

vs.

RAY A. C. JOHNSON, State Auditor of Public Accounts for the State of Nebraska in his official capacity and individually,

Defendant.

MEMORANDUM OF DECISION ON REMAND AND ORDER

(Filed February 27, 1984)

Remand has been made of the First Amendment and similar state law claims for further consideration consistent with the opinion of the appellate court. The mandate was received January 23, 1984, and on February 13, 1984, a further order remanded for hearing and determination of the issue of attorney's fees on appeal.

FREE SPEECH

Under the test of *Pickering v Board of Education*, 391 U.S. 563, 568 (1968), the task of the court is to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Both the nature of the employee's expression and the nature of the employment relationship are to be considered. *Con-*

nick v Myers, — U.S. —, 103 S.Ct. 1684, 51 U.S.L.W. 4436 (1983). The Circuit Court's interpretation of this, according to the November 16, 1983, opinion, is that I should balance "the state's interest in ensuring the efficent operation of the Auditor's Office against Patteson's interest as a citizen, certified public accountant, and state official in truthfully testifying about pending legislation and responding to Senator Chambers' questions concerning the Governor's audit." Slip op., p. 6.

A part of the reason for the plaintiff's discharge was what the plaintiff said during his testimony before a legislative committee on March 5, 1981. The hearing of the committee was on a bill which would require the state auditor to be a certified public accountant. In supporting the bill the plaintiff opened his statement to the committee by saying:

> " . . . I'm a Deputy State Auditor. I'm a CPA. I have aspired to be the State Auditor. I think I probably will in the future. So that probably makes me a little biased. I am biased because I am an auditor and I know what's involved in being an auditor. I know what it takes to do a good job of auditing. . . ."

He told the legislative committee generally that he favored a law that would require the state auditor to be a CPA. Senator Chambers asked him directly about an audit of the Governor's office that had been in the news, asking specifically why he, as deputy, had not signed it, and whether a state auditor who was a CPA (the defendant, as State Auditor, was a CPA) is governed by CPA's standards and whether an auditor who is a CPA is amenable to correction by the board of the Society of Certified Public accountants for not keeping CPA's standards. Patte-

son responded that he had not signed the audit of the Governor's office because in his judgment "it didn't disclose everything I felt it should have . . . ," plaintiff's Exhibit 2, page 27; that he could not answer for "Mr. Johnson, the Auditor" as to whether he, Johnson, was required while in office to adhere to CPA's standards of auditing, *ibid*, at 30; but that,

> " . . . the question is really do I, Mr. Johnson, have to follow the ethics and the standards of the generally-accepted auditing standards that I accepted at the time I . . . became a Certified Public Accountant. Now, I would say that as far as I'm concerned, I have carried over the standards . . . and we try to use them in the office . . . If he [a state auditor] had to be a CPA and he had to follow those standards, then you would have recourse against him because the Society itself would have to take action. . . ."
>
> *Ibid*, at 31, 33

and that if the state auditor were a CPA he might be amenable to correction by the board should he act in a way contrary to the standards. *Ibid.*, p. 34

At the time of the statement to the legislative committee Patteson was a candidate for state treasurer and had expressed to Johnson a concern over his, Patteson's, lack of name recognition. Some of the motivation for some of the statements to the committee regarding the Governor's audit and accountability for acting contrary to CPA standards probably was, therefore, to enhance his own political stature. Nonetheless, the testimony before the committee was primarily for the purpose of encouraging generally passage of a bill to require the state auditor to be a CPA, a position not at odds with that of Johnson. Patteson was a member of the legislative committee of the

Nebraska Society of Certified Public Accountants, which had caused the bill to be introduced and who had asked Patteson to testify at the legislative hearing. Patteson received Johnson's approval to the act of testifying before testifying. There is no doubt that the legal qualifications for holding the office of state auditor are a matter of public concern and testimony of one serving as deputy auditor can be and should be considered to be of interest and importance to the legislative process. It is also true that the audit of the Governor's office, which had been completed in September 1980, had been a matter of public interest before the hearing of March 5, 1981, and it is true that it was apparent, at least a few minutes before Patteson began his statement to the legislative committee, that Senator Chambers would ask Patteson, if he testified, about the Governor's audit.

As a citizen, as a deputy auditor, and as a CPA, Patteson had a legitimate and substantial interest in speaking his support for the proposed legislation and to speak truthfully in direct response to questions by Senator Chambers on subjects, such as the Governor's audit, which related to that proposed legislation. The audit report had not been in compliance with generally accepted auditing standards or with standards promulgated by Johnson for operation of his office, and that fact was a proper subject for inquiry in connection with the legislative bill being considered. The Court of Appeals, in its slip opinion at page 10, has already said:

> "Undoubtedly, Patteson's statement that the Governor's Audit 'did not disclose everything it needed to disclose in order for [him] to sign it' related to a matter of substantial public concern. His testimony

> came within days after the press and the legislature had devoted significant attention to the Governor's Audit, and in particular to whether the audit report attempted to conceal certain expenses in the Governor's Office. Moreover, Patteson made the statement in response to a question by Senator Chambers, and nothing in this record indicates his testimony was other than truthful."

On the other hand, the state in the person of State Auditor Johnson, had a legitimate and substantial interest in the efficient and successful operation of the public auditor's office. Communication between Johnson, State Auditor, and Patteson, Deputy State Auditor, needed to be free and continuous in order for the office to run efficiently or successfully. The relationship between the plaintiff and the defendant as subordinate and superior was supposed to be, and needed to be for the effective running of the office, exceptionally close. The plaintiff was to act in the place of the defendant when the defendant was absent. The plaintiff had assisted in the making and carrying out of policies of the office; the defendant had depended upon him to discern and articulate to the defendant all kinds of matters relating to the office. As the closest associate in the office, the plaintiff occupied a position that called for special trust and confidence. Whatever would prevent such trust and confidence would be destructive to a vital interest of the state.

Deterioration of the relationship, however, preceded the legislative testimony. Disagreement between Patteson and Johnson about the audit of the Governor's office had smoldered for several months before Patterson's legislative appearance, and at the time of the testimony that disagreement was deep and divisive.

That Patteson's testimony before the legislative committee caused disruption in his relationship with Johnson is certain. It pushed over the brink what had been teetering there. There is no evidence that it had any other disruptive effect on anyone. The relationship between Patteson and Johnson immediately before Patteson's statement to the committee was strained and fragile, largely because of Patteson's view of the faulty audit of the Governor's office of a few months earlier. Patteson's effectiveness had been diminished before his legislative testimony and, although he remained in place, the state's interest in maintaining the kind of effectiveness his tenuous presence brought by the time he testified before the committee was moderate at best.

Viewing the interest of the state in light of the specific facts of the Patteson-Johnson relationship that was fractured by the legislative speech, in comparison with the specific facts of Patteson's motivations for testifying before the committee, I find that the state's interest was weaker than Patteson's.

Accordingly, Patteson's constitutional right to free speech was abridged and he is entitled to relief.

RELIEF

Compensatory and punitive damages, reinstatement, other equitable relief, and attorney's fees are sought against the defendant in his official and individual capacities.

Damages are permitted in such cases in some circumstances. Here, there is no necessity that the state pay a

judgment of damages and the defendant may personally be held liable for his acts and the damages resulting. See *Scheuer v. Rhodes,* 416 U.S. 232 (1974).

The defendant is entitled, however, to the benefit of of the good faith immunity described in *Harlow v. Fitzgerald,* —U.S.—, 50 U.S.L.W. 4815 (June 24, 1982). A member of the executive branch is qualified for such a limited immunity. Although I cannot be sure where the burden of proof lies (see Justice Rehnquist's concurring opinion in *Gomez v. Toledo,* 446 U.S. 635 (1980)), I am persuaded that the law was not "clearly established" when the defendant terminated the plaintiff's employment, and therefore an official in the defendant's position "could not reasonably be expected to anticipate legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald,* supra. Although there existed cases announcing principles of free-speech law, the applicability of those principles to the circumstances of Johnson's action was certainly not free of doubt. After hearing arguments of counsel at the trial, reading briefs by both sides, doing further research, and contemplating with care, I was of the view that the closeness of the relationship between Johnson and Patteson meant that the speech exercised by Patteson was not constitutionally protected. See my memorandum of decision of August 20, 1982, filing 15. I think that view was not an unreasonable one and I cannot hold that Johnson was not in good faith—using the objective standard of Harlow—with such a view. He therefore is immune from liability for damages.

Equitable relief is on a different footing. Reinstatement is in order, unless Patteson's presence would be so

disruptive as to be contrary to the interests of all concerned. I think reinstatement would be practically useless because of the weak relationship that existed between Patteson and Johnson at the time of the termination and the undoubted deterioration of the relationship since then. Patteson ran for the office of Auditor of Public Accounts against Johnson after the termination and made uncomplimentary statements about Johnson and termed the audit of the Governor's office of late 1980 as "shoddy, inaccurate." If he were to be reinstated, the chances are excellent that he would not remain in place for more than a few months and perhaps less and would furnish virtually no useful service as Johnson's deputy. Under those conditions I think I should offer the defendant the choice of two alternatives: reinstatement or payment of an amount representing the salary and other benefits Patteson would accrue if he were to be reinstated for the period he reasonably could be expected to remain. The second alternative is not damages as such but an equitable substitute for a fruitless and ill-fated reinstatement. I compute the amount that may be paid under the second alternative to be $10,800.00. See *Cancellier v. Federated Department Stores,* 672 F.2d 1312 (C.A. 9th Cir. 1982); *Dickerson v. DeLuxe Check Printers, Inc.,* 703 F.2d 276 (C.A. 8th Cir. 1983).

The plaintiff also is entitled to an attorney's fee under 42 U.S.C. § 1988 as the prevailing party, both in this court and in the Court of Appeals. A showing needs to be made in that regard, and I call attention to *Eckerhart v. Hensley,* — U.S. —, 51 U.S.L.W. 4554 (May 16, 1983).

STATE LAW CLAIM

Count II of the amended complaint is based upon state law.

Section 20-148, R.R.S. Neb. (Reissue 1977), provides that any person who subjects any other person to the deprivation of rights secured by the United States Constitution or the Constitution and laws of the State of Nebraska shall be liable to the injured person. The plaintiff also cites *Mau v. Omaha National Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), which says that Nebraska has not yet adopted the rule that an employee may claim damages for wrongful discharge "when the motivation for the firing contravenes public policy," but that some jurisdictions have. In view of § 20-148 of the statutes I doubt that the Supreme Court of Nebraska is likely to adopt a common law rule of liability applicable to cases like this one that is any broader than the statute.

The significance of the state law count lies in the question of whether the Nebraska statute eliminates the common law qualified immunity available to members of the executive branch of government, thus broadening liability for damages. I have found no ground for thinking that the qualified immunity doctrine, firm in the common law, was intended to be abrogated by the statute, and counsel have offered no such ground.

The plaintiff's state law claim, therefore, is coextensive with the § 1983 claim and the relief should be the same for both.

IT HEREBY IS ORDERED that the plaintiff shall have fifteen days from the date of this order to present his showing by affidavit or otherwise as to attorney's fees in

this court and the appeals court and the defendant may respond within ten days thereafter.

Dated February 24, 1984.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV81-L-217

CHUCK R. PATTESON,

Plaintiff,

vs.

RAY A. C. JOHNSON, State Auditor of Public Accounts for the State of Nebraska in his official capacity and individually,

Defendant.

JUDGMENT

(Filed March 22, 1984)

Pursuant to the memorandum of decision on remand dated February 24, 1984, and the memorandum on attorney's fees dated today,

IT IS ORDERED:

1. That the plaintiff's constitutional right to free speech was abridged by the defendant and the plaintiff shall be reinstated immediately to the position held by the plaintiff immediately before his discharge by the defendant on July 15, 1981, or, at the option of the defendant, the plaintiff shall receive from the defendant $10,800.00, together with interest at the rate of 10.60 per cent per annum from today until paid; and

2. That the plaintiff shall recover from the defendant an attorney's fee in the amount of $33,621.50 and costs and expenses of $1,111.41, with interest at the rate of 10.60 per cent per annum from today until paid.

Dated March 22, 1984.

BY THE COURT
/s/ Warren K. Urbom

ENTERED ON THE DOCKET March 22, 1984.

Chief Judge
William L. Olson, Clerk
By /s/ Kathleen K. Nelson
Dep. Clerk

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 84-1548

Chuck R. Patteson,

Appellee,

vs.

Ray A. C. Johnson, State Auditor of Public Accounts for the State of Nebraska, in his official capacity and individually,

Appellant.

Appeals from the United States District Court
for the District of Nebraska

No. 84-1549

Chuck R. Patteson,

Appellant,

vs.

Ray A. C. Johnson, State Auditor of Public Accounts for the State of Nebraska, in his official capacity and individually,

Appellee.

Submitted: May 6, 1985
Filed: April 2, 1986

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

PER CURIAM.

Ray A. C. Johnson appeals from the judgment of the United States District Court for the District of Nebraska granting relief to Chuck R. Patteson pursuant to 42 U.S.C. § 1983. For the reasons set forth below, we affirm in part and reverse in part.

I. BACKGROUND

These are the facts as recited by this Court in *Patteson v. Johnson*, 721 F.2d 228 (1983) (*Patteson I*):

> Patteson, a certified public accountant, began working in the Nebraska State Auditor's Office in 1975. The following year Johnson promoted Patteson to Deputy Auditor. The Deputy Auditor ranks next to the State Auditor and in his absence may act in his place.
>
> Sometime in 1978 or 1979, the Auditor's Office, under Johnson's direction, began following the American Institute of Certified Public Accountants' Generally Accepted Auditing Standards (CPA Standards). The Auditor's Office also began following the General Accounting Office's Auditing Standards (GAO Standards), and started issuing opinions with every audit. In addition, Johnson developed his own internal auditing standards. Johnson instructed his staff to follow all of these standards.
>
> On September 18, 1980, the Auditor's Office issued an audit on the operations of the Governor's Office from 1977 to 1980. The audit did not contain an opinion section, and for this reason failed to comply with the CPA Standards, the GAO Standards, or Johnson's own standards. Several months later, in a March 1, 1981 story headlined, "Audit of Governor's Office Lacks Usual Endorsements," the Lincoln Sunday Journal and Star published an article asserting that the audit departed from the recently adopted ac-

counting standards. The article noted that the audit "fails to discuss issues of potential embarrassment to Governor Charles Thone despite the fact that Johnson's staff members raised them during their audit." The article also noted that Thone and Johnson are both Republicans. Patteson, who was by this time a Republican candidate for State Treasurer, declined comment to the press.

Four days later, Patteson and Johnson, who also was a certified public accountant, attended a state senate committee hearing to testify on proposed legislation that would require the State Auditor to be a certified public accountant. Patteson appeared at the hearing at the invitation of the legislative committee of the Nebraska Society of Certified Public Accountants, which was supporting the legislation. As the hearing proceeded, it became apparent that the senators were going to inquire about the audit of the Governor's Office (Governor's Audit). At this point Johnson left the hearing, but did not ask Patteson to leave, and in fact did not give him any instructions.

Patteson remained at the hearing and testified in favor of the proposed legislation. In the course of his testimony, the legislators asked questions about the Governor's Audit. In response to a question from Senator Chambers inquiring why Patteson had not signed the Governor's Audit, Patteson stated, "In my opinion the audit did not disclose everything it needed to disclose in order for me to sign it." After that Patteson avoided direct answers to Senator Chambers' questions that pressed for additional information about the audit.

At the urging of several senators, the Nebraska State Board of Accountancy (State Board) considered the audit of the Governor's Office, and, at its March 18, 1981 meeting, referred the matter to its Ethics and Standards Enforcement Committee for an investigation. The Committee, however, delayed its investigation, and requested the Attorney General to issue an

> opinion outlining the scope of the State Board's jurisdiction over the matter. On June 12, 1981, the Attorney General issue an opinion stating that the State Board had no jurisdiction over the matter. That same afternoon Johnson terminated Patteson's employment. Thereafter, Patteson filed for and unsuccessfully ran against Johnson for the position of State Auditor.

Id. at 529-30 (footnotes omitted).

This is the second time this case has come before this Court. In *Patteson I*, Patteson appealed from the district court's judgment dismissing his fourteenth amendment due process claim and his free speech claims under the first amendment and Nebraska law. This Court affirmed the district court's judgment on the due process claim, but vacated and remanded its judgment on the free speech claims for consideration under *Connick v. Meyers*, 461 U.S. 138, 103 S. Ct. 1684 (1983). On remand, the district court held that Johnson had violated Patteson's first amendment rights.[1] It then found that since the law regarding the constitutional protection of Patteson's speech had not been clearly established at the time of Patteson's dismis-

---

[1]Neb. Rev. Stat. § 20-148 (Reissue 1977) provides, in relevant part:

> (i) Any person * * * who subjects * * * any citizen of this state * * * to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

The district court found that Patteson's claim under this statute was coextensive with his section 1983 claim, and that relief should be the same for both.

sal, Johnson was entitled to a good faith immunity from damages under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). It went on to hold, however, that Patteson was entitled to equitable relief, namely reinstatement. The district court then stated that because of the friction between Johnson and Patteson, Patteson probably would not last longer than a few months after reinstatement. It therefore offered Johnson the choice of reinstating Patteson or paying him $10,800, an amount roughly equivalent to the value of the salary and benefits he could be expected to accrue.

On appeal, Johnson argues that his termination of Patteson did not violate Patteson's first amendment rights. On cross-appeal, Patteson argues that the district court granted only limited prospective relief, while he is entitled to full prospective relief from the date of the district court's judgment on remand.[2]

II. DISCUSSION

A state cannot terminate public employees for exercising their first amendment rights. *See Pickering v. Board of Education*, 391 U.S. 563, 574, 88 S.Ct. 1731,

---

[2]Patteson also argued that in light of Neb. Rev. Stat. § 20-148 (Reissue 1977) and *Todd v. Bd. of Educ. Lands & Funds*, 154 Neb. 60, 48 N.W.2d 706 (1941), the state has waived its sovereign immunity, and that he was therefore entitled to back pay and other benefits. This Court certified that issue to the Nebraska Supreme Court, which found that section 20-148 does not "constitute a waiver of sovereign immunity by the State of Nebraska for actions brought in federal court under 42 U.S.C. § 1983 (1982)," *Patteson v. Johnson*, certified opinion No. 84-876 at 3 (May 3, 1985), and that *Todd* does not interpret any Nebraska statute as constituting a waiver of sovereign immunity for actions brought in federal court pursuant to a contract. *Id.* at 14.

> 1737, 20 L.Ed.2d 811 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589, 605-06, 87 S.Ct. 675, 684-85, 17 L.Ed.2d 629 (1967). Nevertheless, while employees do not relinquish their right to speak out on issues of public concern when they enter public service, those rights may be subject to the overriding interests of the state as an employer. Under the *Pickering* test, the court's task is to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." *Pickering, supra,* 391 U.S. at 568, 88 S.Ct. at 1734. In weighing these competing interests, courts are to consider both the nature of the employee's expression and the nature of the employment relationship. *See Connick v. Myers,* [461] U.S. [138], 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Hughes v. Whitmer,* 714 F.2d 1407 (8th Cir. 1983).

Patteson I, 721 F.2d at 231.

On remand, the district court found that Patteson's interests outweighed the state's and that his constitutional right to free speech had been abridged. It reasoned that "[a]s a citizen, as a deputy auditor, and as a CPA, Patteson had a legitimate and substantial interest in speaking his support for the proposed legislation and to speak truthfully in direct response to questions * * * on subjects, such as the Governor's audit, which related to that proposed legislation." Memorandum of Decision on Remand and Order of February 24, 1984 (Memorandum) at 3. It added that this was also a matter of substantial public concern. *Id.* The district court then observed that "the state in the person of State Auditor Johnson, had a legitimate and substantial interest in the efficient and successful operation of the public auditor's office." *Id.* at 3-4. It noted,

however, that because the relationship between Johnson and Patteson prior to Patteson's testimony before the legislative committee had been "strained and fragile, * * * the state's interest in maintaining the kind of effectiveness his tenuous presence brought by the time he testified before the committee was moderate at best." *Id.* at 4. We agree with the district court's analysis.

After the district court found that Johnson had violated Patteson's first amendment rights, it focused on the issue of remedies. It stated that although Johnson is immune from liability for damages under *Harlow*, "[e]quitable relief is on a different footing. Reinstatement is in order, unless Patteson's presence would be so disruptive as to be contrary to the interests of all concerned." Memorandum at 5. It then reasoned that "reinstatement would be practically useless because of the weak relationship that existed between Patteson and Johnson" and predicted that "[i]f he were to be reinstated, the chances [were] excellent that he would not remain in place for more than a few months." *Id.* at 5. It therefore offered Johnson the choice of reinstating Patteson or paying him $10,800, "an amount representing the salary and other benefits Patteson would accrue if he were to be reinstated for the period he reasonably could be expected to remain." *Id.* at 6. It emphasized that "[t]he second alternative is not damages as such but an equitable substitute for a fruitless and ill-fated reinstatement."

A number of federal courts, including this one, have approved the award of monetary damages in lieu of reinstatement. *See e.g., Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984); *Gibson v. Mo-*

hawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982). This form of relief should be used sparingly, however, because there is a danger that its use would allow employers to rid themselves, at will, of any employee, however impermissibly. In many instances, such relief would not adequately compensate the plaintiffs for the loss of their jobs, because plaintiffs are generally concerned not only about their pay, but also about job satisfaction. In this case, however, we find that the district court did not abuse its discretion in fashioning this remedy.

Patteson argues that in addition to reinstatement, or its monetary equivalent, he is entitled to full prospective relief from the date of the district court's judgment until his reinstatement or proper termination. The Supreme Court has held that an award "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials" is barred by the eleventh amendment. *See Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974). Prospective relief, on the other hand, is not barred. *Nevels v. Hanlon*, 656 F.2d 372, 377-78 (8th Cir. 1981). Accordingly, Patteson is entitled to prospective relief, including salary, accrual time for retirement vesting, and other benefits, from March 22, 1984, the date of the district court's judgment on remand, until such time as Patteson is either reinstated or receives the payment of damages in lieu of reinstatement. This prospective relief should be reduced by any salary or benefits Patteson has accrued in this period, in mitigation.

Accordingly, we affirm the judgment of the district court insofar as it found that Patteson's first amendment rights have been violated and ordered reinstatement or

damages in lieu of reinstatement. We reverse to the extent that the district court failed to award prospective relief, and remand to the district court with directions to adjust its award consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.